KUBOTA AGRICULTURAL MACHINERY SDN BHD

v.

SHARIZAN SDN BHD & ANOR;
SHARIZAN SDN BHD & ORS (THIRD PARTIES)

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI JC
[CIVIL SUIT NO: (D9) C-1996-1985]
27 FEBRUARY 2001

EVIDENCE: *Credibility - Weight to be given to testimony of witness - Documentary evidence - Company documents - Admissibility - Whether maker of documents need to be called - Section 73(a) Evidence Act 1950*

CONTRACT: *Guarantee - Letter of demand - Whether a guarantee or not - Consideration - Past consideration - Whether guarantee was bad for past consideration - Whether there was variation on terms of guarantee - Whether letter of demand constitutes a proper and valid demand - Waiver or abandonment of rights - Whether applicable - Whether principle of contra proferentem applicable*

The plaintiff, a supplier of agricultural heavy equipment, sold certain goods and equipments to the first defendant. The second defendant is the insurance guarantor who undertook to guarantee payment for value of goods bought by the first defendant while the third parties had agreed to guarantee and indemnify the second defendant against all claims, losses, damages, expenses and all liabilities whatsoever arising from the second defendant providing the said insurance guarantee to the plaintiff.

The first defendant had in purported payment of the purchase price of the said equipment and goods issued a cheque in favour of the plaintiff which was subsequently dishonoured on presentation to the bank. Thus, the plaintiff in this action is claiming against the second defendant as liable under the guarantee to pay the amount claimed from the sale of goods and equipment to the first defendant. Further, the second defendant had obtained default judgment against all the third parties.

The second defendant mainly contended: (i) on the credibility of the plaintiff's witness's testimony and the documentary evidence tendered by the plaintiff; (ii) whether the letter dated 26 October 1984 constitutes a guarantee; (iii) issue of past consideration on the insurance guarantee; (iv) the issue of variation on the terms of the guarantee; (v) that there was no proper or valid demand

sent to the second defendant; (vi) issue of waiver or abandonment of rights; and (vii) whether the principle of *contra proferentem* applied in favour of the second defendant.

Held:

[1] Even though the plaintiff's witness was only employed by the plaintiff in 1998 and had no personal knowledge of the events that took place in 1984, her evidence was based on relevant documents in the possession of the plaintiff company.

[1a] All the makers of the documents had left the company and cannot be traced. Their attendance to testify in court cannot be procured without an amount of delay and expenses. It must be noted that this action was filed in 1985 and has been pending in court for 16 years. As such, s. 73(a) of the Evidence Act 1950 may be invoked where the maker of the document may be available but his attendance to testify in court cannot be procured without an amount of delay and expenses. In essence, the court has wide discretionary powers under s. 73(A)(2), 73A(5) and 73(A)(6) as well as s. 32(1)(b) and (j) of the Evidence Act 1950 to admit all the documentary evidence.

[2] The intention of the second defendant's letter on 26 October 1984 which was the first guarantee, was to serve as a "credit guarantee" for the first defendant, which was a binding contract that advised the plaintiff that the second defendant is issuing a security guarantee for the said purchase. The insurance guarantee dated 13 November 1984, is not a fresh guarantee as such but a redrafted guarantee which formed part and parcel of the same guarantee and thus, both documents bind the second defendant as guarantor.

[3] The second defendant argued if the deliveries of equipments made under the guarantee were made before the validity period of the guarantee, *ie*, 13 November 1984, then it was submitted that the guarantee was bad for past consideration. Based on the express provisions in the language of the guarantee, it was completely silent as to the time frame for the first defendant to purchase the goods from the plaintiff. Thus, the second defendant's argument cannot be accepted.

[4] The second defendant raised the issue that when the first defendant or third party made the purported payment with the dishonoured cheque after the validity period of the guarantee, *ie*, 15 December 1984,

amounted to a variation of the guarantee which discharged the second defendant from liability. This was not accepted as there was no evidence to support such a contention.

[5] The second defendant submitted that since the plaintiff failed to state the reference number in its first letter of demand in respect of the guarantee, the letter could not constitute a proper and valid demand. The court however, was satisfied that the contents of the letter was clear and precise. There was no uncertainty as to which guarantee the plaintiff was seeking to enforce against the second defendant, as it was the only guarantee involving the plaintiff and both the defendants.

[6] The second defendant further contended that the plaintiff's solicitors second letter of demand amounted to an abandonment or waiver of rights the plaintiff may have had with the first letter of demand. However, it was found that the second letter of demand was by way of the plaintiff's reminder of the second defendant's liability under the said guarantee when the first letter failed to elicit any response from the second defendant.

[7] Should there be any ambiguity as to the interpretation of the insurance guarantee, the second defendant submitted that the maxim *contra proferentem* should be applied to their favour and against the plaintiff. However, the court was not convinced that there was any genuine ambiguity in the insurance guarantee and thus did not apply the maxim. In the circumstances, the second defendant is liable under the guarantee to pay the amount claimed by the plaintiff in this action.

[Plaintiff's claim allowed with costs.]

Case(s) referred to:

Arab Malaysian Merchant Bank Bhd v. Chong On Foh Medical Hall & Liquor Dealers [1997] 4 MLJ 532 ***(refd)***

Midland Counties Motor Finance Co Ltd v. Slade [1951] 1 KB 346 ***(dist)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Bhd [1989] 3 MLJ 155 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 79, 86, 88

Evidence Act 1950, ss. 32(1)(b), (j), 73A(2), (5), (6)

For the plaintiff - Victoria Ng; M/s YK Ng & Co
For the 2nd defendant - Tunku Farik; M/s Azim, Tunku Farik & Wong

Reported by Raja Vishnu

JUDGMENT

Ramly Ali JC:

The Parties

The plaintiff is a supplier of agricultural heavy equipments. The 1st defendant is a customer of the plaintiff in respect of goods and equipments *vide* purchase order no. 0048 to purchase the following:

a) Kubota Tractor Model M5500;

b) Kubota Tractor Model L300;

c) Tipping Trailer;

d) Used Rotary Ditcher;

e) Laverda Rice Combine Harvester Model 3350R (hereinafter called "the said goods and equipments")

for the total purchase price of RM287,280. The 2nd defendant is an insurance guarantor to guarantee payment for the value of the goods and equipments bought by the 1st defendant up to the limit of RM285,180. The third parties were brought in to the proceeding by the 2nd defendant on the ground that they had undertook to guarantee and indemnify the 2nd defendant against all claims, losses, damages, expenses and all liabilities whatsoever arising from the 2nd defendant providing the said insurance guarantee to the plaintiff.

The Claim

The plaintiff's claim against both the defendants is for goods and equipments sold and delivered to the 1st defendant for a sum of RM285,180 together with related interest and costs. From the facts of the case it seems that the 1st defendant, in purported payment of the said purchase price, had issued a cheque in favour of the plaintiff for the sum of RM285,180, which cheque was dishonoured on presentation at the bank with the remark "not arranged for".

Brief Records Of The Proceedings

The writ of summons in this case was filed on 19 April 1985. The 1st defendant had failed to enter appearance. Thus a judgment-in-default was entered against the 1st defendant on 17 June 1985 for the amount claimed together with interest at 8% per annum from 19 April 1985 until the date of full payment and RM250 costs. Subsequently there was execution on the default judgment by way of writ of seizure and sale carried out and a sum of

RM102,637.13 was obtained from the proceeds of the sale of goods and equipments seized and auctioned off. The outstanding sum owing by both the defendants has therefore been reduced to RM182,542.87 accordingly.

The 2nd defendant has obtained default judgment against all the third parties on 5 September 2000.

Thus, the present proceeding before this court, is only against the 2nd defendant on the reduced claim of RM182,542.87, together with the related interest and costs.

Facts Of The Case

The plaintiff relied substantially on documentary evidence to establish it's case based on the relevant documents kept in the course of it's ordinary business. The 2nd defendant objected to the admissibility of most of these documents. However, at the end of the trial, the court finds that most of the documents are admissible (for reasons to be given later). Thus, based on the evidence of PW1 and all the relevant documents (which had been admitted as evidence) the brief facts of the case are as follows:

Vide purchase order no: 0048 dated 20 January 1984, the 1st defendant ordered the following goods and equipments from the plaintiff:

i) Kubota Tractor Model M5500

ii) Kubota Tractor Model L300

iii) Tipping Trailer

iv) Used Rotary Ditcher

v) Strake wheel for M5500 Tractor

vi) Laverda Rice Combine Harvester Model 3350R.

for the total purchase price of RM287,280. However, the Strake Wheel for M5500 Tractor (item (v) in the purchase order) was supplied free of charge to the 1st defendant. Thus the total purchase price was accordingly reduced to RM285,180. By way of its business practice and policy the plaintiff required the 1st defendant to provide a guarantor to guarantee payment for the value of the said goods and equipments. The 1st defendant arranged with the 2nd defendant to stand as guarantor.

The 2nd defendant initially issued a written guarantee in a form of a letter dated 26 October 1984 (hereinafter called "the 1st guarantee") in favour of the plaintiff for that purpose (however 2nd defendant denied this letter to be

a guarantee). Since the said 1st guarantee did not particularise the goods and equipments contained in the purchase order no: 0048, the plaintiff requested the 2nd defendant to redraft the 1st guarantee to set out clearly the specific goods and equipments bought by the 1st defendant to the value of RM285,180 so that there would be no ambiguity or dispute later on as to the actual goods and equipments to be covered under the said guarantee. The 2nd defendant forwarded the redraft of the guarantee and issued an insurance guarantee dated 13 November 1984 (hereinafter called "the insurance guarantee"), specifying the actual items purchased and their respective costs to the value of RM285,180, as per the purchase order no: 0048. The insurance guarantee provides expressly that it was "effective from 13 November 1984 to 15 December 1984 and is conditional upon a claim thereunder being made in writing by the expiry date." The plaintiff made a written claim on 10 December 1984 against the 2nd defendant on the insurance guarantee but the 2nd defendant failed to settle the amount. (The 2nd defendant admitted having received this written claim 2 December 1994 but claimed that it was invalid). Sometimes end of December 1984, the plaintiff received a cheque from a third party *ie*, Syarikat Sharizan dated 31 December 1984 for a sum of RM285,180 in purported payment of the plaintiff's claim. The said cheque was dishonoured on presentation for payment with an advice from Perwira Habib Bank Malaysia Bhd., and with the remarks "not arranged for". The plaintiff sent a reminder to the 2nd defendant to settle the claim on the guarantee but the 2nd defendant failed to respond. Subsequently, the plaintiff instructed its solicitors to issue a letter of demand dated 9 March 1985 to both 1st and 2nd defendants, but again this was ignored. (The 2nd defendant admitted receiving this letter of demand but contended that it was invalid because it was made outside the validity period of the said guarantee). A part from the said guarantees issued by the 2nd defendant to guarantee payment for the goods purchased by the 1st defendant *vide* purchase order no: 0048, the plaintiff was not aware of any other guarantee or credit facility arranged for by the 1st defendant to pay for the goods bought from the plaintiff.

Issues Raised By the 2nd Defendant

The 2nd defendant raised the following issues:

i) that PW1 had no personal knowledge of the facts of the transaction and that she testified based solely on the documents in her custody; that her evidence is hearsay unless the makers of the documents are called to testify; that all the documents not in the agreed bundle are inadmissible unless the makers are called to testify;

ii) that the letter dated 26 October 1984 from the 2nd defendant to the plaintiff is not a guarantee nor can it be construed as one;

iii) past consideration for the insurance guarantee, thus the guarantee is bad and unenforceable;

iv) variation on the terms of the guarantee, thus it become bad and enforceable against the 2nd defendant as guarantor;

v) that there was no proper or valid demand sent to the 2nd defendant;

vi) waiver or abandonment of rights under the earlier notice of demand dated 10 December 1984; and

vii) that the principle of *contra proferentem* applied in favour of the defendant.

Credibility of PW1's Testimony And The Documentary Evidence Tendered by the Plaintiff

The 2nd defendant argued that the testimony of PW1 was merely hearsay and carried no weight whatsoever and should totally be disregarded by the court. The 2nd defendant said so on the grounds that PW1 (the sole witness for the plaintiff) who was only employed by the plaintiff as an accountant in 1998 does not have personal knowledge of what transpired in 1984 or any time before 1998. The 2nd defendant also argued that all documents which are not agreed upon by the parties, must be strictly proved during trial and the maker of those documents must be called to testify in court. The 2nd defendant contended that in this case, the plaintiff had failed to call the maker of those documents and thus the evidence relating to the contents of the documents through PW1's testimony are just hearsay evidence and should not be accepted. The 2nd defendant even applied to expunge some of the PW1's testimony on the grounds of hearsay and based on documentation that has not been properly proved at trial.

At the commencement of the trial PW1 stated that she is the accountant in the plaintiff company and that when the transaction arose between the plaintiff and the defendants sometime in 1984/1985 she had not yet been employed by the plaintiff company. It was clear that PW1 had no personal knowledge of the events that took place in 1984 and that her evidence and testimony in court was solely based on the relevant documents in the possession of the plaintiff company. PW1 testified that she is in charge of financial matters in the plaintiff company. She also testified that all the other staff involved in the transaction had left the company and thus the company was not able to trace them now. It has to be stressed that the dispute arose in 1984 and the trial only took place in January 2001, a lapse of some 17 years. The personalities directly involved in the said transaction have since left the employment in the plaintiff company and it is unreasonable to expect the plaintiff company to trace their whereabout now. In the circumstances, their

attendance to testify in court cannot be procured without an amount of delay or expenses. The court, is of the opinion that this is a fit and proper case to invoke sub-s. (2) of s. 73A of the Evidence Act 1950 on the admissibility of documentary evidence in civil cases. Section 73A(2) of the Evidence Act 1950 reads as follows:

> 73A(2). In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissibie as evidence or may, without any such order having been made, admit such a statement in evidence –
>
> a) notwithstanding that the maker of the statement is available but is not called as a witness; and
>
> b) notwithstanding that the original document is not produced, if, *in lieu* thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

In *Arab Malaysian Merchant Bank Bhd v. Chong On Foh Medical Hall & Liquor Dealer*s [1997] 4 MLJ 532 Abdul Hamid J (now JCA) ruled as follows:

> Under the section, a statement is admissible under three circumstances:
>
> 1) where the maker is called to give evidence – sec. 73A(1)(i);
>
> 2) where the maker is not available but proviso to sub-s. (1) of that section is satisfied; and
>
> 3) where the maker is available but not called as a witness, under circumstances provided by sub-s. 2 of that section.
>
> It should be understood that sub-s (2) is separate from sub-s. (1). Under sub-s. (1) the statement is not admissible unless:
>
> (a) the maker himself gives evidence; or
>
> (b) the proviso applies
>
> The proviso is a proviso to sub-s. (1), and not to sub-s. (2). So if the statement is not admissible under sub-s. (1), the learned magistrate should have considered whether it was admissible under sub-s. (2). Under sub-s. (2), the statement is admissible if the Court is satisfied that undue delay or expense would be caused in order to call the maker to give evidence.

In our present case, the court is of the opinion that to sub-s. (2) of s. 73A applies *ie*, where the maker of the statement or document may be available but his attendance to testify in court cannot be procured without an amount of delay and expenses. It must be noted that this action was filed on 19 April 1985. It was postponed numerous times for various reasons. This case had been pending in court for 16 years. All the makers of the documents, particularly Mr. C.M. Chong who was the general manager of the plaintiff company in 1984 had left the company and cannot be traced. The plaintiff was not able to trace him because there was no present address and no contact numbers. To call the maker of the statements would mean further postpontment for this action. It would be very unfair to the plaintiff. So, it is only proper and appropriate for the court to invoke s. 73A(2) of the Evidence Act 1950 in this action.

The counsel for the 2nd defendant objected at the admissibility of document not tendered by the maker in the proceeding when PW1 tried to tender those documents. So as not to hamper the trial, the court ruled that the issue on admissibility of those documents would be decided after submissions by both parties. Section 73A(2) of the Evidence Act 1950 allows the court to do that "at any stage of the proceeding."

The relevant documents whose admissibility are being objected by the 2nd defendants are found in the Non-Agreed Bundle (IPTS). Those documents are made in the ordinary course of business and some of them consist of entries and memorandum made in books kept in the ordinary course of business. They are documents used in commerce and trade. Such being the case, the court is also of the opinion that those documents or statements are relevant and can be admitted in evidence under s. 32(1)(b) of the Evidence Act 1950. Section 32(1)(b) provides –

> (1) Statement, written or verbal of relevant facts made by a person who is dead or **who cannot be found**, or who has become incapable of giving evidence or **whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable** are themselves relevant facts in the following cases:
>
> (b) when the statement was made by any person in the ordinary course of business, and in particular when it consist of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him or of the date of a letter or other document usually dated, written or signed by him.

The rest of the documents objected by the 2nd defendant comprise of court's documents and court's correspondence relating to the writ of seizure and sale dated 8 October 1985 in respect of the default judgment against the 1st defendant. The court is of the view that these documents, made by public officers in the discharge of his duties, are relevant and can be admissible in this proceeding. Section 32(1)(j) of the Evidence Act 1950 clearly states that "where the statement was made by a public officer in the discharge of his duties" the statements or documents are relevant facts.

In the premise, the court hold that all those documents in the non-agreed bundle which were tendered and produced by PW1 in the course of her testimony in court are admissible for the purpose of this proceeding. The court is given wide discretionary powers to admit the evidence under the provisions of ss. 73A(2); 73A(5); 73A(6) as well as s. 32(1)(b) and (j) of the Evidence Act 1950. To hold otherwise would be against the commercial realities. Commercial activities would be adversely affected.

In estimating the weight to be attached to those statements, the court had considered all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular, to the question whether or not the statement was made contemporaneously with the occurance or existance of the facts stated and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts. This is provided under s. 73A(6) of the Evidence Act 1950. In this case, the court is satisfied that all those documents were made contemporaneously with occurance or existance of the facts stated. Also, there's nothing to indicate that the maker of those documents had any incentive to conceal or misrepresent facts.

The counsel for the 2nd defendant also applied in his submission that some answers by PW1 in her witness statement be expunged from the notes of evidence on the grounds that PW1 has no personal knowledge regarding the matters and the statements being hearsay and based on documentation that has not been properly admitted and proved in the trial. The relevant answers are answers to questions nos: 2, 5, 7, 8, 9, 10, 12, 14, 15 and 20. The court had scrutinised all the said answers and satisfied that they relate to the statements or documents which had been admitted earlier under s. 73A(2) and s. 32 of the Evidence Act 1950. Therefore, the court finds that the said application is without merit.

Whether The Letter Dated 26 October 1984 From The 2nd Defendant To The Plaintiff Is A Guarantee Or Not

The 2nd defendant contended that the only guarantee that was issued by the 2nd defendant to the plaintiff refers to the insurance guarantee dated

13 November 1984. To the 2nd defendant, the letter dated 26 October 1984 is not a guarantee and thus has no contractual effect. On the other hand, the plaintiff is saying that the said letter dated 26 October 1984 is the 1st guarantee issued by the 2nd defendant in respect of the same goods and equipments supplied to the 1st defendant. However, the plaintiff had requested the 2nd defendant to redraft the said 1st guarantee because it did not particularise all the goods and equipments supplied to the 1st defendant, as a result of which the insurance guarantee dated 13 November 1984 was issued by the 2nd defendant in favour of the plaintiff. The issue whether the letter dated 26 October 1984 was a guarantee or not is relevant because it relates to the validity of the 1st notice of demand issued by the plaintiff to the 2nd defendant dated 10 December 1984 since the said notice of demand made reference to the "guarantee issued on 26 October 1984," thus the 2nd defendant is saying that the said notice of demand was invalid as it referred to a letter which was not a guarantee.

For better understanding of the issue, the said letter dated 26 October 1984 is reproduced below:

Tarikh: 26 October 1984

Kubota Agricultural Machinery Sdn. Bhd.

Lot 15 Jalan Pahat
P.O Box 69
Shah Alam
Selangor

Dear Sirs

Re: Credit Guarantee in respect of Sharizan Sdn. Bhd. Amount – Rgt 285,180.00

With reference to the above, we hereby wish to advise that we are issuing the Security Guarantee for the said purchase subject to all terms being met.

Trusting the above document is in order.

Thank you.

Yours faithfully

Sgd.

Sharifah Rafiah Yahya
Manager – Underwriting

According to the evidence, the 1st defendant submitted its purchase order no: 0048 on 1 October 1984 to purchase the said goods and equipments from the plaintiff. The plaintiff insisted on a guarantee for the value of the goods ordered. The 1st defendant then arranged with the 2nd defendant to give the guarantee up to the limit of RM285,180. Then on 26 October 1984, the said letter was issued by the 2nd defendant to the plaintiff.

In order for the court to come to a conclusion as to whether the said letter dated 26 October 1984 and subsequently the insurance guarantee dated 13 November 1984 form part and parcel of the same guarantee for the same goods and equipments delivered to the 1st defendant, at the 1st defendant's request and order, to the value of RM285,180, the court has to consider the intention of the parties, the surrounding circumstances and the form and contents of the said documents themselves.

The intention of the 2nd defendant *vide* its letter dated 26 October 1984 was clear and unequivocal. It was intended to serve as a "credit guarantee" for Sharizan Sdn. Bhd. (1st defendant) to the amount of RM285,180. Hence the said letter was duly signed by none other than the manager of underwriting of the 2nd defendant. It is immaterial that the said letter was not signed by the general manager of the plaintiff. It is a binding contract. Acting upon the said letter of guarantee the plaintiff proceeded to deliver the said goods and equipments to the 1st defendant. It is also immaterial that the said guarantee was not stamped. As to the contents of the said letter of guarantee, the wordings should be given its literal interpretation. The title of the said letters clearly refers "credit guarantee in respect of Shahrizan Sdn. Bhd. amount – Rgt. 285,180." The content of the letter, eventhough very brief, makes reference to the title and advised the plaintiff that the 2nd defendant is issuing the security guarantee for the **said purchase**. Section 79 of the Contracts Act 1950 states –

> A contract of guarantee is a contract to perform the promise or discharge the liability, of a third person in case of his default.

The said letters contained all the basic and necessary elements of a creation of a guarantee, *ie*, a guarantor, principle debtor, a creditor, the amount guaranteed, the purchase and the agreement to issue the guarantee by the guarantor.

As testified by PW1, upon insistence of the plaintiff, the subsequent document in the form of an insurance guarantee dated 13 November 1984 was issued by the 2nd defendant in favour of the plaintiff in respect of the same goods and equipments delivered to the 1st defendant for the same value of RM285,180, after the 1st letter dated 26 October 1984 found not particularising the goods purchased and to avoid uncertainty in the future. Thus the court

finds that the 2nd document, *ie*, the insurance guarantee dated 13 November 1984, in the form of a properly stamped insurance guarantee, is **not** a fresh guarantee as such, but a redrafted guarantee specifying the goods and equipments purchased by the 1st defendant and their respective costs thereof to the extent of RM285,180, in favour of the plaintiff as per the 1st defendant's purchase order No: 0048.

The full text of the insurance guarantee dated 13 November 1984 is as follows:

Tarikh: 13 November 1984

Kubota Agricultural Machinery Sdn. Bhd.
Lot 15, Jalan Pahat
P.O Box 69
Shah Alam
Selangor

Dear Sirs

INSURANCE GUARANTEE

At the request of M/S SHARIZAN SDN. BHD. of No. 120A Jalan Jejaka, Taman Maluri, Cheras, Kuala Lumpur, we, CAPITAL INSURANCE BERHAD, hereby guarantee that the sum of Malaysian Ringgit Two Hundred and Eighty-Five Thousand and One Hundred and Eighty Only (M$285,180.00) being the amount of Security Deposit required to be deposited for the due performance of the covenants of their contract with you to supply the following:

Item

No	Description	No. of Units	Unit Cost	Total Value
1.	Kubota Tractor Model M5500 63HP complete with Rotary Tiller HR20/1 80	3	M$32,300.00	M$96,900.00
2.	Kubota Tractor Model L300 Complete with Rotary Tiller Model HR11/155	1	M$22,500.00	M$22,200.00
3.	Tipping Trailer 3-4 for wooden body	2	M$ 4,140.00	M$ 8,280.00

4.	Used Rotary Ditcher Model M45LD	1	M$ 7,500.00	M$ 7,500.00
5.	Laverda Combine Harvester Model 3350	1	M$150,000.00	M$150,00.00
				M$285,180.00

and shall become payable by us in the event of their failure to perform the said covenants.

This Guarantee is effective from 13 November 1984 to 15 December 1984 and is conditional upon a claim thereunder being made in writing by the expiry date.

Your faithfully,

Sgd.
Zahanor Tan Sri Ahmad
General Manager

Based on the above consideration, the court is satisfied that both the letter dated 26 October 1984 and the subsequent insurance guarantee dated 13 November 1984 issued by the 2nd defendant in favour of the plaintiff form part and parcel of the same guarantee for the same goods and equipments delivered to the 1st defendant for the same amount of RM285,180. Thus both the documents bind the 2nd defendant as the guarantor.

Past Consideration Of The Insurance Guarantee

The 2nd defendant also contended that there was an issue of past consideration in respect of the insurance guarantee, thus making the said guarantee unenforceable against the 2nd defendant as the guarantor. The 2nd defendant argued that if there were deliveries of the equipments that were the matter of the guarantee, that deliveries were made prior to 13 November 1984, *ie*, before the validity period of the guarantee, and as such it was submitted that the guarantee was bad for past consideration, unless the plaintiff can prove that the delivery of the goods were made during the validity period as provided under the insurance guarantee.

In the first place there is nothing in the said insurance guarantee to say that the goods must be delivered to the 1st defendant within the said validity period. The said insurance guarantee was completely silent as to the time frame for the 1st defendant to purchase the said goods from the plaintiff. The last paragraph of the said insurance guarantee reads:

This Guarantee is effective from 13th November 1984 to 15th December 1984 and is conditional upon a claim there under being made in writing by the expiry date.

Based on a literal interpretation of the word "effective", the said guarantee is therefore valid, enforceable and subsisting between the period 13 November 1984 and 15 December 1984. In other words, a claim will only be valid if submitted during the specified period and will only be entertained if it is made in writing between the two date, *ie*, 13 November 1984 and 15 December 1984. The 2nd defendant had misconstrued the last paragraph of the said guarantee to mean that "provided the said goods are purchased and delivered to the 1st defendant between the period 13 November 1984 to 15 December 1984, the 2nd defendant is not liable under the said guarantee," and in the premise has misconceived and raised the issue of past consideration on the said guarantee. The court cannot read into the document something which is not there. In *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Bhd* [1989] 3 MLJ 155, at pg 156, Lee Hun Hoe J had said –

> where an obligation exists by virtue of a covenant, its extent is to be measured only by the words of the covenant.

He went to say (at the same page) that:

> The document in question, that is the letter of guarantee signed by the third Defendant, like every other guarantee, must be construed according to the intention of the parties as expressed by the language they have employed, understanding it fairly is the sense in which it is used.

In our present case, was it the intention of the parties that "the goods and equipments in question must be purchased and delivered by the plaintiff to the 1st defendant during the validity period of 13 November 1984 and 15 December 1984" as alleged by the 2nd defendant, eventhough there is no express provisions in the language of the guarantee. From the facts and surrounding circumstances of the case, the court cannot gather such intention laboured between the parties at the time when the guarantee was issued. In the first place, if there was such an intention between the parties, the 2nd defendant could have inserted a few more words "and the goods and equipments being delivered during those period", at the end of the last paragraph of the guarantee. As stated in the last paragraph of the guarantee, that the said guarantee "is conditional upon a claim there under being made in writing by the expiry date". In other words, any claim to be made by the plaintiff under the guarantee must be made in writing between 13 November 1984 and 15 December 1984. The literal understanding of this condition cannot go together with the 2nd defendant's argument that the goods and equipments in question must also be delivered during the same validity period. No logic can accept that argument. As provided under s. 79 of the Contracts Act 1950, "a contract of guarantee is a contract to perform the promise or discharge the liability, of a third person (the principal debtor) in case of his default." The

said guarantee also provides that it was "for the due performance of the covenants of their (1st defendant) contract with you (plaintiff) to supply the goods and equipments and shall become payable by us (2nd defendant) in the event of their (1st defendant) failure to perform the said covenants." From these provisions, it is clear that before any demand or claim on the guarantee can be made by the plaintiff, there must be events which have first occurred that i) the goods and equipments had been delivered as per the relevant purchase order, ii) that the plaintiff must have sent its invoice to the 1st defendant for payment; and iii) that the 1st defendant had defaulted payment according to their covenants. If the said guarantee allows the plaintiff to make its claim beginning 13 November 1984, it can reasonably inferred that the parties, particularly the 2nd defendant, a well-established insurance company, must have anticipated and intended that the goods and products must have been delivered to the 1st defendant before 13 November 1984. So, the 2nd defendant's argument that under the last paragraph of the said guarantee, the goods and equipments in question must be purchased and delivered between 13 November 1984 and 15 December 1984 and at the same time the claim must also be made during the same period is illogical and not practical. It is also illogical and not practical to say that the expiry date for delivery of the goods on 15 December 1984 is also the expiry date for making any claim on the insurance guarantee. Thus the said argument relating to past consideration cannot be accepted.

Variation of the Guarantee

The 2nd defendant also contended that the fact that one Syarikat Shahrizan (a third party) tendered a cheque dated 31 December 1984 towards purported payment of the sum RM285,180 (which cheque was dishonoured on presentation for payment) after the validity period amounted to a variation of the guarantee which discharged the guarantor, namely the 2nd defendant. The 2nd defendant cited ss. 86 and 88 of the Contracts Act 1950 to support it's contention. The 2nd defendant contended that by accepting the said cheque on 31 December 1984 (after the expiry period on 15 December 1984) the plaintiff had in fact allowed the 1st defendant an extension of time to pay the said sum, without the consent of the 2nd defendant as the guarantor. The court feels that such contention by the 2nd defendant is misconceived and baseless. There was no evidence led by the 2nd defendant that the plaintiff had allowed extension of time for the 1st defendant, who is the principal debtor to pay the outstanding sum of RM285,180 or that the plaintiff had varied the terms of the guarantee. There was no evidence to show that the plaintiff had solicited or requested for the cheque. The 2nd defendant had never raised the issue during cross-examination of PW1 or its own witness. Since there was no evidence to that effect, citation made by the 2nd defendant in respect of ss. 86 and 88 of the Contracts Act 1950 does not help. Furthermore, the said cheque was given after the 1st notice of demand was made by the plaintiff

against the 2nd defendant on 10 December 1984 and the validity period on the said guarantee was expired on 15 December 1984. How come the 2nd defendant say that the plaintiff varied the terms of the guarantee which had already expired.

No Proper Or Valid Demand

The 2nd defendant also contended that there is no proper or valid demand on the guarantee made by the plaintiff during the validity period of the guarantee, *ie*, 13 November 1984 to 15 December 1984. The 2nd defendant contended that the 1st demand letter dated 10 December 1984 which was received by the 2nd defendant on 11 December 1984 (which was still during the validity period), referred to "a non-existent guarantee and did not have a reference number for the 2nd defendant to refer to". As such the 2nd defendant submitted that the said letter (IPTS – 19) cannot constitute a proper and valid demand.

The said letter of demand dated 10 December 1984 is reproduced below:

Date: 10 December 1984

Capital Insurance Bhd
Tingkat 3 Bangunan Asia Insurance
No. 2 Jalan Raja Chulan
KUALA LUMPUR 05-02

(U/P: Cik Sharifah Rafiah Yahya)

Dear Sir/Madam

YOUR GUARANTEE ISSUED IN RESPECT OF EQUIPMENT PURCHASES BY MESSRS. SHARIZAN SDN BHD

We refer to your guarantee issued on 26 October 1984 in our favour, in respect of equipment purchases made by Sharizan Sdn Bhd.

As we have received no payment from the said company, we are under the terms of the guarantee, submitting our claim to you in respect of the sum of Rgt 285,180.00 being equipment supplied to the said company.

We enclose the following in respect of our claim.

i) Invoices Nos. 65203, 65349 and 65241.

ii) Copies of Delivery Orders.

We look forward to your prompt settlement of the above.

Yours faithfully
For KUBOTA AGRICULTURAL MACHINERY SDN BHD

Sgd.

HAMZAH MOHD SALLEH
General Manager

Just because the said letter of demand failed to state the reference number for the 2nd defendant to refer to, the 2nd defendant is saying that the said letter of demand referred to a non-existent guarantee. With due respect, the court cannot accept this contention. DW1 the sole witness for the 2nd defendant, admitted that the 2nd defendant did receive the said letter of demand. In his examination-in-chief, DW1 testified that the said letter of demand –

> I would not know the exact value of the guarantee given in this case. Without the reference number, it would be difficult for me to determine which particular guarantee the letter referred to.

PW1 testified that the 2nd defendant failed to respond on the said letter of demand and at the same time, DW1 agreed in his cross-examination that there was only one guarantee for and on behalf of the 1st defendant. Looking at the said insurance guarantee dated 13 November 1984, DW1 admitted that "there was no confusion about what goods, what values – because only one guarantee involved (pg 14 of notes of evidence)." To the court, eventhough the said letter contains no reference number for the 2nd defendant, the contents of the letter are clear and precise. The subject matter was:

> Your guarantee issued in respect of equipment purchases by Messrs Sharizan Sdn Bhd.

The amount claimed as stated in para. 2 was clearly stated in the 1st guarantee dated 26 October 1987 and the insurance guarantee dated 13 December 1984. Further, several invoices and delivery orders detailing the goods and their respective costs were also enclosed with the said letter of demand. There is no uncertainty as to which guarantee the plaintiff was seeking to enforce against the 2nd defendant through the said letter of demand, knowing fairly well that it was the one and only guarantee involving the plaintiff and both the defendants. It is sad to say that, such a well-established insurance company such as the 2nd defendant, the general manager (DW1) came to court and testified that his company would not be able to locate or determine which particular guarantee the plaintiff's letter of demand dated 10 December 1984 referred to, without stating the reference number of his company, while on the other hand admitting that there was only one guarantee issued by his

company involving the plaintiff and both the defendants. After that there was no respond from the 2nd defendant. The 2nd defendant never made any enquiry to get better particulars from the plaintiff.

According to PW1, the plaintiff did send reminder to the 2nd defendant, but there was no response.

Finally, the plaintiff instructed it's solicitor to send a formal letter of demand but the 2nd defendant contended that it was invalid being given outside the validity period, *ie*, 13 November 1984 to 15 December 1984. This is what DW1 said in his evidence:

> (Refer 3rd para IPTS 22) From this paragraph I would be able to trace which guarantee it refers to. This letter of demand was outside the validity period.

During cross-examination (at pg 15 of notes of evidence) DWI said:

> (Refer IPTS 22) We received this letter. As far as I am concerned, we denied the claim, but I am not sure whether we have written to the Plaintiff in reply to his letter.

On the premise, the court cannot accept the 2nd defendant's contention on this issue. The court is satisfied that there was a valid notice of demand or letter of claim made during the validity period or the insurance guarantee.

Waiver

The 2nd defendant had also contended that the plaintiff's solicitor's letter of demand dated 9 March 1985 (IPTS 22) was the only letter of demand which cited the correct guarantee but since it was issued after 15 December 1984, it was outside the validity period for making such claim and therefore the 2nd defendant is not liable to pay the plaintiff under the said guarantee. Further the 2nd defendant submitted that the subsequent conduct of the plaintiff is sending its solicitor's letter of demand on 9 March 1985 (IPTS 22) amounted to a waiver or abandonment of any rights they may have had under the earlier letter of demand dated 10 December 1984 (IPTS 19).

Again the court cannot agree with such submission. There was no evidence of waiver or abandonment on the part of the plaintiff of their rights under the guarantee. If anything, the plaintiff, in sending it's solicitors letter of demand on 9 March 1985, just wanted to make sure by way of reminder to the 2nd defendant of their liability under the said guarantee. That has to be done by the plaintiff as the plaintiff's own letter of demand earlier (dated 10 December 1984) failed to elicit any response from the 2nd defendant.

Contra Proferentem

The 2nd defendant submitted that the court should apply the maxim *contra proferentem* to construe the document strictly against the plaintiff should there be any ambiguity as to the interpretation of any instrument. To support his contention, the 2nd defendant cited the case of *Midland Counties Motor Finance Co Ltd v. Slade* [1951] 1 KB 346 where Cohen LJ at p. 354 had said –

> ... if I was still in doubt, the maxim that an instrument should be construed *contra proferentem* would lead me to the same conclusion.

Based on this maxim, the 2nd defendant submitted that both the insurance guarantee dated 13 November 1984 (IPTS 19) and 9 March 1985 (IPTS 22) should be construed *contra proferentem*, that is strictly against the plaintiff and in favour of the 2nd defendant as guarantor.

The court is of the opinion that the said maxim *contra proferentem* does not apply to the facts of our present case. In *Midland Counties Motor Finance Co Ltd* (as cited by the 2nd defendant) the court was dealing with a situation where the creditor had clearly granted to the hirer an extension of time for the repayment of outstanding installments. There was ambiguity in the instruments of the hire. In our present case, the facts are far different from that of the *Midland Counties* case. There was no evidence to show that the plaintiff had granted an extension of time to the 1st defendant to pay the outstanding balance. There was also no ambiguity or uncertainty as to the guarantee and other relevant documents in this case. The maxim *contra proferentem* only applies where there is a genuine ambiguity in the interpretation of a document. It does no apply to 'self-made' ambiguity created by the guarantor just for the purpose of getting its undue benefit.

Conclusion

For the reasons above mentioned the court is satisfied and hold that the 2nd defendant is liable under the guarantee to pay the amount claimed by the plaintiff in this action. The amount outstanding, after deducting the proceed of the sale arising from the execution of the judgment against the 1st defendant, is RM182,542.87.

Accordingly judgment be entered against the 2nd defendant for the plaintiff for a sum of RM182,542.87 together with interest at 8% per annum from 9 May 1985 to date of full payment and costs to be taxed.